IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FOTOMEDIA TECHNOLOGIES, LLC, **Plaintiff,** **vs.** **AOL LLC, AMERICA ONLINE, INC., PHOTOBUCKET.COM, INC., SHUTTERFLY, INC., CNET NETWORKS, INC., AND YAHOO! INC.,** **Defendants.**	**CIVIL ACTION** **2:07-CV-255-TJW** **JURY TRIAL**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT, AND MOTIONS TO STRIKE

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I. INTRODUCTION

Plaintiff FotoMedia Technologies, LLC ("FotoMedia") files this response in opposition to the motions to dismiss, or for a more definite statement, of Defendants Photobucket.com, Inc., [Dkt. No. 42-1], Shutterfly, Inc., [Dkt. No. 43], CNET Networks, Inc., [Dkt. No. 46], Yahoo! Inc., [Dkt. No. 47], and AOL LLC, [Dkt. No. 48].

Defendants implicitly concede that FotoMedia's complaint states a claim for direct infringement of the patents-in-suit by the accused photosharing web sites; they argue only that FotoMedia has failed to put them on notice that their infringement has also been willful and indirect. [Dkt. No. 42-1 at 3, 8]. In particular, Defendants suggest that FotoMedia has failed to plead specific facts relating to each Defendant's "knowledge of the risk of infringement," "culpable state of mind," and, with respect to the claims of indirect infringement, the "direct infringers [that] must exist." [Dkt. No. 42-1 at 2 (emphasis added)]. As to the first two suggestions, however, the law is clear that—even under the most stringent pleading standards, not triggered here—"intent, knowledge, and other condition of mind . . . may be averred generally." FED. R. CIV. P. 9(b). As to the third suggestion, Defendants' briefing demonstrates their full understanding that, with respect to the indirect claims, the direct infringement involves "[Defendants'] customers' use of their web services in the United States." [Dkt. No. 42-1 at 7].

Defendants were apparently emboldened to file these motions to dismiss—which otherwise would fairly be considered frivolous and dilatory—by the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Contrary to their argument, however, the Court in *Bell Atlantic* explicitly rejected the application of "any 'heightened' pleading standard" outside the context of allegations of fraud or mistake. *Id.* at 1973 n.14. And if doubt remained on that point, the Federal Circuit dispelled it in its recent opinion in *McZeal v. Sprint Nextel Corp.*, No. 2006-1548, 2007 U.S. App. LEXIS 22025, at *6-*9 (Fed. Cir. Sept. 14, 2007). Because FotoMedia's complaint "contains enough detail to allow the defendants to answer," *id.* at *8, these motions must be denied.

II. BACKGROUND

FotoMedia filed this patent-infringement suit against Defendants on June 16, 2007. [Dkt. No. 1-1]. As the complaint states, FotoMedia is the owner of three photosharing-related patents. [Dkt. No. 1-1]. Each patent is attached in full to the complaint. [Dkt. No. 1-2 to 1-4]. A cursory review of these patents-in-suit reveals that they are directed to, *inter alia*, a "method of sharing image data between a user and a recipient," [Dkt. No. 1-2 at 27], a "system for processing and sharing digital images over a network," [Dkt. No. 1-3 at 27], and a "method for controlling access to image metadata," [Dkt. No. 1-4 at 11]. Each specification describes an embodiment in which, using the Internet, one person can share a digital photograph with another.

Defendants "own, operate, or otherwise control photosharing web sites"—that is, web sites by which, using the Internet, one person can share a digital photograph with another. These web sites infringe each of FotoMedia's three photosharing-related patents. [Dkt. No. 1-1 at 3]. To minimize any risk of confusion, the complaint specifically identifies six of the infringing web sites by name. [Dkt. No. 1-1 at 3 ("http://pictures.aol.com," "http://photobucket.com," "http://www.shutterfly.com," "http://www.webshots.com," "http://flickr.com," "http://photos.yahoo.com")]. The complaint then informs Defendants that they

> have been and are now directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of [FotoMedia's patents] . . . by, among other things, making, using, licensing, selling, offering for sale, or importing photosharing web site services alone or in combination with personal computers, as well as related services covered by one or more claims of [each of the patents-in-suit].

[Dkt. No. 1-1 at 4-5]. The complaint also avers that Defendants' "acts of infringement have been willful, deliberate, and in reckless disregard of FotoMedia's patent rights." [Dkt. No. 1-1 at 4-5].

To remedy these acts of infringement, FotoMedia seeks a judgment that Defendants "have infringed, directly and indirectly by way of inducing infringement and/or contributing to the infringement of" the patents-in-suit; a permanent injunction enjoining them "from infringing, inducing the infringement of, or contributing to the infringement of" the patents-in-suit; damages for the infringement; treble damages for Defendants' willful acts; and attorneys' fees. [Dkt. No. 1-1 at 6-7].

The allegations of infringement in FotoMedia's complaint, and the corresponding requests for relief, look very much like the allegations and requests found in many, if not most, of the patent-infringement complaints filed in this District. As required by the Federal Rules, FotoMedia's complaint is short and concise while still being clear and informative—the complaint itself is seven pages long; the patents attached as exhibits comprise an additional sixty-seven pages. [Dkt. No. 1-1 to 1-4]. Nevertheless, Defendants suggest that the complaint has failed to put them on notice sufficient to enable them to answer, and move to dismiss under Rule 12(b)(6) or, in the alternative, for a more definite statement under Rule 12(e). [Dkt. Nos. 42-1, 43, 46-48].

III. ARGUMENT

A. *Bell Atlantic* Did Not Alter the Liberal Pleading Standards of Rule 8(a).

Defendants' motions to dismiss turn entirely on the proposition that, in the recent *Bell Atlantic* decision, "the Supreme Court tightened the pleading requirements under Fed. Rule of Civ. P. 8(a)." [Dkt. No. 42-1 at 1]. That proposition, however, has been rejected both by the Federal Circuit and by the Supreme Court itself. Because the Court did not alter the liberal pleading standards of Rule 8(a) in *Bell Atlantic*, but simply "appl[ied] these general standards to a [Sherman Act] § 1 claim," 127 S. Ct. at 1965, that case provides no support for Defendants' arguments that—notwithstanding a half-century of caselaw to the contrary—FotoMedia must plead specific facts to support each element of each claim asserted in its original complaint.

1. Rule 8(a) requires only simple notice pleading.

Rule 8(a) requires only that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

> Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' This simplified notice pleading standard relies on liberal discovery rules and summary judgment

> motions to define disputed facts and issues and to dispose of unmeritorious claims.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391, 396 (5th Cir. 2005) (same); *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (noting the "liberal system of 'notice pleading' set up by the Federal Rules").

The "simplicity and brevity of statement which the rules contemplate" is exemplified by the Forms appended to the Rules of Civil Procedure. FED. R. CIV. P. 84. Of particular relevance, Form 16 demonstrates the level of specificity sufficient to sustain a "Complaint for Infringement of a Patent":

> Defendant has for a long time past been and still is infringing [the patent-in-suit] by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

FED. R. CIV. P. app. Form 16; *see also Posey*, 415 F.3d at 396 (noting that the Forms confirm that "an undetailed allegation will suffice" to meet rule 8(a)'s "low bar"). Contrary to Defendants' suggestion, "parsing the allegations into elements has never been required." *Posey*, 415 F.3d at 396. Instead, as the Federal Circuit recognized in *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000), the rules require nothing more than that the "complaint contain[s] enough detail to allow the defendants to answer."[1]

Because the bar set by Rule 8(a)'s notice pleading requirement is low, a "motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M University Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). As the Fifth Circuit has emphasized, "dismissal of a claim . . . on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Jones v. United States*, 729 F.2d 326, 330 (5th Cir. 1984) (citation omitted); *see also id.* ("In the interest of long-term judicial economy and simply as a matter of good practice, this Court has consistently urged trial courts to pause long, before granting motions to dismiss on the face of the pleadings.").

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[1] Indeed, even cases cited as authority by Defendants flatly reject their Rule 12(b)(6) arguments. The court in *Agilent Tech., Inc. v. Micromuse, Inc.*, for example, held in no uncertain terms that

> [t]he federal rules require . . . only that the complaint state a claim, not that it plead the facts that if true would establish (subject to any defenses) that the claim was valid . . . . All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer.

No. 04-CV-3090, 2004 U.S. Dist. LEXIS 20723, at *8-*9 (S.D.N.Y. Oct. 19, 2004) (citation omitted).

2. *Bell Atlantic* did not change Rule 8(a)'s pleading requirements.

In *Bell Atlantic*, the Supreme Court addressed whether a class action brought under § 1 of the Sherman Act "can survive a motion to dismiss . . . absent some factual context suggesting agreement" in violation of § 1. 127 S. Ct. at 1961. Applying the "general standards" established by many of the rules and cases cited above, the Court—affirming the trial court's application of settled law—held that a complaint predicated upon an alleged antitrust violation should be dismissed in the absence of any factual context plausibly suggesting an antitrust violation. *Id.* at 1964-66, 1973. The Court explicitly rejected the idea that it was applying "any 'heightened' pleading standard" in reaching its decision. *Id.* at 1973 n.14. And in an apparent effort to minimize the risk that its holding would be misunderstood, or taken out of context, the Court explained that it was particularly concerned about "the unusually high cost of discovery in antitrust cases," and desired to "avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Id.* at 1967 (internal quotations and citations omitted).

Notwithstanding the Court's focus on issues unique to antitrust claims, as well as its insistence that it was not tightening the Rule 8(a) standards, the *Bell Atlantic* decision has generated a fair amount of discussion in the lower courts in the months since it was issued. This is undoubtedly due in large part to the fact that the Court did make one change to the old law in *Bell Atlantic*—it disavowed an oft-quoted "early statement" to the effect that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* *id.* at 1968-69; *Conley*, 355 U.S. at 45-46. In doing so, however, the Court did not suggest that it was rewriting any pleading standard; instead, it characterized the old "no set of facts" phrase "as an incomplete, negative gloss" on the "accepted" standard. *Bell Atlantic*, 127 S. Ct. at 1969.[2]

If any legitimate doubt remained as to the Court's own view of the significance of *Bell Atlantic*, it was dispelled two weeks later, when the Court issued its decision in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). For in *Erickson*, a *per curiam* Court cited *Bell Atlantic* as standing for the decades-old proposition that the "liberal pleading standards set forth by Rule 8(a)(2)" require only "a short and plain statement" giving "the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 127 S. Ct. at 2200 (citation omitted).

A recent decision of the Federal Circuit—applying Fifth Circuit procedural law—further confirms that *Bell Atlantic* should not be read, as the Defendants urge, to have upset the long-settled approach to notice pleading under Rule 8. In *McZeal v. Sprint Nextel Corp.*, No. 2006-1548, 2007 U.S. App. LEXIS 22025, at *6 n.4 (Fed. Cir. Sept. 14, 2007), the Federal Circuit considered, and firmly rejected, the possibility "that *Bell Atlantic* changed the pleading requirements of Federal Rule of Civil Procedure 8." After *Bell Atlantic*, therefore—just as before—"a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend." *McZeal*, 2007 U.S. App. LEXIS 22025, at *7. Any complaint that "contains enough detail to allow the defendants to answer . . . thus meets the notice pleading required to survive a Rule 12(b)(6) motion. . . . Nothing more is required." *Id.* at *8-*9.[3]

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[2] Significantly, Defendants do not argue that the sufficiency of any claim in FotoMedia's complaint turns on the application of this discredited "no set of facts" phrase.

[3] In its notice of joinder, AOL suggests that the *McZeal* case should be disregarded because it involved a pro se litigant and allegations of infringement under the doctrine of equivalents. [*See* Dkt. No. 48 at 2]. The Federal Circuit's relevant holding in that case, however, is both directly on point and fatal to Defendants' motions: the *Bell Atlantic* decision did not change the pleading requirements of Rule 8(a). *McZeal*, 2007 U.S. App. LEXIS 22025, at *6-*7.

B. FotoMedia's Willful Infringement Pleadings Are Sufficient.

Defendants' argument with respect to FotoMedia's willfulness pleading amounts to this: they have received sufficient notice to tell the Court whether or not their photosharing web sites directly infringe FotoMedia's patents, but they cannot—on these pleadings—determine whether or not their own infringing acts are and have been willful. Not surprisingly, this counterintuitive argument is completely foreclosed by the Forms, the Rules, and the relevant caselaw.

As an initial matter, Form 10 demonstrates the level of specificity required, at the pleading stage, where the "evidence may justify a finding of willfulness or recklessness or of negligence":

> defendant . . . willfully or recklessly or negligently drove or caused to be driven a motor vehicle . . . .

FED. R. CIV. P. app. Form 10. That is it. In other words, willfulness—and recklessness, for that matter—may be generally averred at the pleading stage. Defendants' assertion that "[m]ere negligence is not enough—a defendant must plead facts to support a 'reckless disregard' of plaintiff's patents," [Dkt. No. 42-1 at 4], is thus patently mistaken.[4]

The sufficiency of a bare willfulness pleading, as exemplified in Form 10, follows directly from the interaction of Rules 8(a) and 9(b). As seen above, Rule 8(a) requires only "a short and plain statement of the claim"—in the Form 10 example, negligence; in this case, patent infringement. Rule 9(b), in turn, provides that "intent, knowledge, and other condition of mind . . . may be averred generally." Because Rule 9 sets a higher pleading bar than Rule 8, anything that may be "averred generally" under Rule 9 may also be "averred generally" under Rule 8. And because each Defendant's willfulness relates to the "condition of mind" with which it infringed FotoMedia's patents—what it "knew or should have known" as it engaged in its infringing activities—that condition of mind may be generally averred in a complaint for patent infringement.

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[4] Defendants do not, and cannot, contest the continuing validity of the Forms, as they were approved and relied upon by both the Supreme Court in *Bell Atlantic*, 127 S. Ct. at 1970 n.9, and the Federal Circuit in *McZeal*, 2007 U.S. App. LEXIS 22025, at *6.

This result is confirmed by the caselaw. *See Multi-Tech. Sys., Inc. v. Dialpad.com*, No. 00-CV-1540, 2001 U.S. Dist. LEXIS 23575, at *6-*7 (D. Minn. Aug. 28, 2001) (holding that "mere allegations of willful infringement" are sufficient under Rule 8(a)); *see also*, *e.g.*, *Northwest Pipe Co. v. The Travelers Indemnity Co. of Connecticut*, No. C-02-04189JF, 2003 U.S. Dist. LEXIS 26416, at *7-*8 (N.D. Cal. Feb. 12, 2003) ("Plaintiff need not plead evidentiary facts to support his contention that Defendant had the requisite mental state to impose punitive damages."); *Clark v. Allstate Ins. Co.*, 106 F. Supp. 2d 1016, 1019 (S.D. Cal. 2000) ("In federal court, a plaintiff may include a 'short and plain' prayer for punitive damages that relies entirely on unsupported and conclusory averments of malice or fraudulent intent.").

The recent Federal Circuit cases cited by Defendants do not suggest a different result. In *In re Seagate Tech., LLC*, No. M-830, 2007 U.S. App. LEXIS 19768, at *22 (Fed. Cir. Aug. 20, 2007), the Federal Circuit held "that proof of willful infringement permitting enhanced damages requires at least a showing of objective recklessness." As with the *prima facie* case addressed in *Swierkiewicz*, however, this "is an evidentiary standard, not a pleading requirement." 534 U.S. at 511. In fact, the Federal Circuit in *Seagate* clearly anticipated that the existence of the requisite recklessness would be "determined by the record developed in the infringement proceeding." 2007 U.S. App. LEXIS 19768, at *23. The decision in *Mitutoyo Corp. v. Central Purchasing, LLC*, No. 2006-1312, 2007 U.S. App. LEXIS 21558 (Fed. Cir. Sept. 5, 2007), also provides no support for the Defendants' position. The court in *Mitutoyo* did not hold that willfulness must be pleaded with factual specificity; it noted that the pleading at issue was "plainly more than sufficient" under Rule 8(a), and cited authority holding that the Rule "requires only the bare minimum [of] facts necessary to put the defendant on notice of the claim so that he can file an answer." *Id.* at *12-*13 (citation omitted).[5]

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[5] The fact that the *Mitutoyo* decision was issued months after the Supreme Court's decision in *Bell Atlantic* is also significant, as the Federal Circuit offered no suggestion in *Mitutoyo* that *Bell Atlantic* had any impact on the standards for pleading willful infringement. 2007 U.S. App. LEXIS, at *12-*13.

FotoMedia's complaint asserts that Defendants' provision of photosharing web site services infringes the three patents-in-suit, and that Defendants have engaged in these infringing activities with the requisite mental state to impose treble damages under 35 U.S.C. § 284. [Dkt. No. 1-1, at 3-6]. Under the Rules, the Forms, and the caselaw, that is sufficient. If Defendants can tell the Court whether or not they have infringed FotoMedia's patents, they can tell the Court whether or not they have engaged in that infringement willfully.

C. FotoMedia's Indirect Infringement Pleadings Are Sufficient.

In support of their arguments that FotoMedia's pleadings of indirect infringement are insufficient, Defendants again rely principally on Federal Circuit cases describing the patentee's relevant burdens at trial—not the standards by which the patentee's pleadings must be judged. [Dkt. No. 42-1 at 5-7]; *see also DSU Med. Corp. v. JMS Co., Ltd.*, 417 F.3d 1293, 1303-06 (Fed. Cir. 2006). Defendants suggest that *DSU Med. Corp.* holds that "a properly pleaded complaint must contain, at a bare minimum, facts to show" each of four separate elements necessary to prove induced and contributory infringement. [Dkt. No. 43-1 at 7, 5]. That case, however, says nothing of the kind—it addresses the sufficiency of evidence at trial, not the level of factual specificity required at the pleading stage. *See DSU Med. Corp.*, 417 F.3d at 1303-06.[6] At the pleading stage, contrary to Defendants' assertion, "parsing the allegations into elements has never been required." *Posey*, 415 F.3d at 396; *see also* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.04 ("Elements of Claim Need Not Be Pleaded"). *Bell Atlantic* certainly did nothing to undermine this longstanding rule. *See* 127 S. Ct. at 1973.

Defendants' particular complaints with the indirect infringement pleadings can be grouped into two categories: those relating to facts about the Defendants' own knowledge or intent, and those relating to the identity of the direct infringers. [Dkt. No. 42-1 at 5-7]. As to Defendants' assertions that FotoMedia must plead specific facts to show what Defendants

[6] The same is true of the *Water Techs. Corp. v. Calco, Ltd.* case cited by Defendants. *See* 850 F.2d 660, 668 (Fed. Cir. 1988); [Dkt. No. 42-1 at 5].

"knew," [Dkt. No. 42-1 at 5, 6], or that they "possessed [some] *specific intent*," [Dkt. No. 42-1 at 5], those are answered again by a simple reference to Rule 9(b). "[I]ntent, knowledge, and other condition of mind . . . may be averred generally." FED. R. CIV. P. 9(b). Again, *Bell Atlantic* did nothing to undermine this longstanding rule. *See* 127 S. Ct. at 1973 n.14. And as to the assertion that Defendants have insufficient notice of the direct infringers' identities, [Dkt. No. 42-1 at 6], that borders on the disingenuous. For shortly after suggesting that they cannot discern who the direct infringers might be, [Dkt. No. 42-1 at 6], Defendants tell the Court that, in order to prove indirect infringement, FotoMedia will have to show that "[Defendants'] customers' use of their web services in the United States constituted an act of infringement." [Dkt. No. 42-1 at 7]. Defendants are thus fully aware that, with respect to FotoMedia's indirect claims, the direct infringement would involve at least their "customers' use of their web services in the United States."[7]

Again, the caselaw supports FotoMedia's position, and not that of Defendants. *See One World Techs., Ltd. v. Robert Bosch Tool Corp.*, No. 04-C-0833, 2004 U.S. Dist. LEXIS 14035, at *6-*7 (N.D. Ill. July 21, 2004) (upholding as sufficient indirect infringement pleadings substantially identical to those at issue). The district court's opinion in *Jackson v. Illinois Bell Tel. Co.*, No. 01-C-8001, 2002 U.S. Dist. LEXIS 13186, at *7-*9 (N.D. Ill. July 8, 2002), is particularly relevant. Relying on the Federal Circuit's opinion in *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000), the court held that

> Jackson's complaint includes all the factual specificity that is required by the federal courts under the notice pleading standard. First, Jackson alleges ownership of the asserted patent by stating that he 'owns all right, title and

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[7] The complaint provides notice on this point when it asserts that the indirect infringement involves, for example, the use of the accused "photosharing web site services . . . in combination with personal computers." [Dkt. No. 1-1 at 4-5]. *But see, e.g.*, *Agilent Tech., Inc. v. Micromuse, Inc.*, No. 04-CV-3090, 2004 U.S. Dist. LEXIS 20723, at *16 (S.D.N.Y. Oct. 19, 2004) (rejecting the argument that a "complaint [must] identify the primary infringer with respect to the contributory and inducement claims"). It should also be noted that the pleadings at issue here are nothing like those in *Ondeo Nalco Co. v. EKA Chems., Inc.*, No. CV-A-01-537-SLR, 2002 WL 1458853 (D. Del. June 10, 2002)—a case cited repeatedly by Defendants—in which the direct infringement claims were "too vague to provide . . . fair notice of which products are accused of infringing" the patents-in-suit.

> interest in and has standing to sue for infringement' of the '900 Patent. . . . Second, Jackson names each individual Defendant. . . . Third, Jackson cites the patent that is allegedly infringed. . . . Fourth, Jackson describes the means by which Defendants allegedly infringe by pleading that 'each of the defendants has infringed the patent in suit either directly or through acts of contributory infringement or inducement.' . . . Jackson further alleges that Ameritech 'provides voice mail systems' and that SBC 'sells answering machines.' . . . Finally, Jackson points to the specific sections of the patent law invoked by alleging a 'violation of 35 U.S.C. § 271.' . . . Thus, as the complaint includes all the factual specificity that is required under the notice pleading standard, we deny SBC and Ameritech's motion to dismiss the complaint.

Jackson, 2002 U.S. Dist. LEXIS 13186, at *8-*9 (emphasis added). Under *Phonometrics* and *Jackson*, FotoMedia's complaint easily meets the Rule 8(a) pleading requirements for patent-infringement cases.[8]

The "liberal pleading standards set forth by Rule 8(a)(2)" require only "a short and plain statement" giving "the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 127 S. Ct. at 2200; *Bell Atlantic*, 127 S. Ct. at 1964. FotoMedia's complaint notifies each Defendant both of the claim against it—indirect infringement—and of the grounds upon which that claim rests: Defendants' photosharing web sites, in combination with their customers' personal computers, infringe each of the three patents attached to the complaint. Defendants' arguments demonstrate that they understand the claims against them full well, [Dkt. No. 42-1 at 5-7], and are in good position "to answer . . . . Nothing more is required." *McZeal*, 2007 U.S. App. LEXIS 22025, at *8-*9.[9]

D. Defendants' Requests For a More Definite Statement Are Meritless.

As an alternative to their motions to dismiss, Defendants briefly request—with a single supporting citation to a New York case—a more definite statement under Rule 12(e). [Dkt. No. 42-1 at 8]. AOL adds two additional pages' worth of argument on the issue, with two additional case citations, in its notice of joinder. [Dkt. No. 48 at 1-2]. Each of the three cases cited by Defendants, however, undermines their position. For each case indicates that Rule 12(e) relief should be available in a patent-infringement action only "where the complaint fails to identify any allegedly infringing product." *Bay Indus., Inc. v. Tru-Arx Mfg., LLC*, No. 06-C-1010, 2006 U.S. Dist. LEXIS 86757, at *3 (E.D. Wisc. Nov. 29, 2006) (emphasis added); *see also eSoft, Inc. v. Astaro Corp.*, No. 06-CV-00441, 2006 U.S. Dist. LEXIS 52336, at *4 (D. Colo. July 31, 2006); *Agilent Tech., Inc. v. Micromuse, Inc.*, No. 04-CV-3090, 2004 U.S. Dist. LEXIS 20723, at *13-*14 (S.D.N.Y. Oct. 19, 2004). FotoMedia's complaint identifies no fewer than six infringing products; under Defendants' cases, therefore, Rule 12(e) relief is not appropriate here.

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[8] In support of their position, Defendants cite *Coolsavings.com, Inc. v. Catalina Mktg. Corp.*, No. 98-C-6668, 1999 U.S. Dist. LEXIS 7891 (N.D. Ill. May 14, 1999). [Dkt. No. 42-1 at 6]. That case, however, was issued by the same court as the *Jackson* and *One World Techs.* cases—prior to the Federal Circuit's opinion in *Phonometrics*. To the extent that it conflicts with those cases, therefore, it is no longer good law.

[9] It is also worth pointing out that, given Defendants' failure to contest FotoMedia's direct infringement claims, the discovery-related concerns animating the Court's decision in *Bell Atlantic*, *see* 127 S. Ct. at 1967, are completely absent in this case. For whatever the outcome of the present motions, the case will proceed on—at the very least—the principal claim of infringement, and discovery into Defendants' infringing activities will commence.

Rule 12(e) provides that,

> [i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

FED. R. CIV. P. 12(e). In this District, a "motion for a more definite statement is not favored," and "although they come within the court's discretion, courts grant the motions sparingly." *Thurmond v. Compaq Computer Corp.*, No. 1:99-CV-0711, 2000 U.S. Dist. LEXIS 22718, at *7-*8 (E.D. Tex. Feb. 28, 2000) (Heartfield, J.) (citation omitted). Further, "Rule 12(e)'s standard is plainly designed to strike at unintelligibility rather than a lack of detail." *Id.* at *8 (citation omitted). Therefore, "absent sheer unintelligibility of a complaint," courts in this District "will not grant a Rule 12(e) motion for more definite statement." *Id.* at *9.

There is nothing unintelligible about FotoMedia's patent-infringement claims, and AOL's briefing on the issue leaves no doubt that it is improperly attempting to use the motion "as a vehicle for [a] fishing expedition[] at the pleading stage." *Id.* at *8 (citation omitted). AOL seeks, in essence, detailed information regarding FotoMedia's specific infringement contentions.

[*See* Dkt. No. 48 at 1-2]. AOL will receive that information—when it is due under this District's Patent Rule 3-1. The Patent Rules were designed to facilitate, with substantial success, "this district's efficient and expeditious management of patent cases." *See Symbol Techs., Inc. v. Metrologic Instruments, Inc.*, 450 F. Supp. 2d 676, 679 (E.D. Tex. 2006) (Davis, J.). The Court should deny these motions, and allow this case to proceed under the Patent Rules without additional delay.

E. The Court Should Not Strike Any Prayer For Relief.

Defendants also ask the Court, should it grant the motions to dismiss, to strike "the related prayers for relief" in FotoMedia's complaint. [Dkt. No. 42-1 at 8]. FotoMedia's position, of course, is that the motions to dismiss are without merit and should be denied. But if the Court does find merit in any of Defendants' arguments, FotoMedia would respectfully request that—rather than striking any portion of the complaint—the Court provide FotoMedia with an opportunity to amend its pleadings in any manner directed by the Court. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.10 ("When pleadings fail to comply with the requirements of Rule 8, . . . pleaders will [usually] be given an opportunity to amend the defective pleading under Rule 15."); *see also* FED. R. CIV. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

IV. CONCLUSION

For the foregoing reasons, FotoMedia respectfully requests that the Court deny Defendants' motions to dismiss or for a more definite statement.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this the 1st day of October, 2007. Local Rule CV-5(a)(3)(A).

/s/ Sam Baxter

Sam Baxter